Filed 4/9/10 P. v. Helm CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LEE HELM,

Defendant and Appellant.

F058104

(Super. Ct. No. 1022889)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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After a trial by jury in 2009, James Lee Helm was found to be a sexually violent predator (SVP) and civilly committed to the Department of Mental Health (DMH) for an indeterminate term under the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code,

§ 6600 et seq.) as amended in 2006 (Stats. 2006, ch. 337, § 53, eff. Sept. 20, 2006; amendment approved by voters, Prop. 38, § 24, eff. Nov. 8, 2006) to authorize an indeterminate term instead of a determinate term.[1]

On appeal, Helm argues (1) that the court's denial of his request for a continuance to obtain the services of an expert witness was an abuse of discretion and a denial of due process, (2) that his indeterminate commitment violated the federal double jeopardy, due process, equal protection, and ex post facto clauses and the federal and state cruel and/or unusual punishment prohibitions, (3) that the use of noncompliant evaluation protocol renders his commitment invalid, and (4) that his attorney rendered ineffective assistance of counsel not only by failing to raise constitutional objections to his commitment but also by failing to object to noncompliant evaluation protocol.

On the basis of a recent California Supreme Court opinion, *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*), we reverse the judgment (order of civil commitment) and remand the case for proceedings solely on the issue of equal protection. Otherwise the judgment is affirmed.

DISCUSSION

1. Continuance

Helm argues the court's denial of his request for a continuance to obtain the services of an expert witness was an abuse of discretion and a denial of due process. The Attorney General argues the contrary.

The issue before us arises out of the court's denial of Helm's request for a continuance on June 15, 2009. Thoughtful analysis of the issue requires review of the record of events preceding the court's order of that date.

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[1] Later statutory references are to the Welfare and Institutions Code unless otherwise noted.

On May 9, 2008, after Helm's arraignment on and denial of the allegation in the amended petition, his attorney informed the court that he had spoken with his anticipated expert witness and that she needed additional time to prepare. On that ground, he requested new dates for both the probable cause hearing and the jury trial. The court continued the probable cause hearing to July 8, 2008.

On July 8, 2008, the court found probable cause to believe that Helm was likely to engage in sexually violent criminal conduct of a predatory nature if released, and his attorney requested additional time so he could talk with his expert to see "if she's going to even be willing to help this time." The court set the matter for a status conference on July 23, 2008.

On July 23, 2008, the court put the status conference over to July 25, 2008. On that date, the court granted Helm's motion to continue the status conference to August 15, 2008. On that date, with a time waiver from Helm, the court scheduled a readiness conference for March 30, 2009, and a jury trial for April 7, 2009. On October 3, 2008, again with a time waiver from Helm, the court advanced the readiness conference to March 19, 2009, and the jury trial to March 24, 2009. On March 19, 2009, the court granted Helm's motion, over the district attorney's objection, for a continuance of the readiness conference, on the ground of expert witness availability, to March 23, 2009.

On March 23, 2009, Helm's attorney informed the court his expert witness would be available on June 16, 2009, the district attorney so informed the court as to both of his expert witnesses and, with no objection by the district attorney, the court granted Helm's motion for a continuance of the readiness conference and the jury trial to June 4, 2009, and June 16, 2009, respectively. The court asked Helm's attorney to communicate to his expert witness that "we really have to stick to this date." The court added, "I don't see how it would be possible to continue it again if she's not available." On June 4, 2009, the court continued the readiness conference to June 15, 2009, and confirmed the jury trial for June 16, 2009.

At the readiness conference on the first day of trial, June 15, 2009, Helm's attorney said, "Your Honor, I do have an issue in terms of our preparedness for tomorrow." Characterizing the issue as "our inability to obtain experts," he explained that after his expert witness evaluated the case "towards the end of April" she said "she didn't think she was going to be a useful witness for us." After asking another expert witness to evaluate "the files, the case notes and summaries," he learned "at the end of May" that he "was also going to decline assisting us with this case." The first opportunity he had to talk with Helm about "not having any experts" was "this past Friday," June 12, 2009, "the first day Mr. Helm was back from Coalinga. And he feels that with another continuance, we would be able to consult and possibly retain an expert for his defense. And he provided me with several names of the people that he feels would be available."

Helm's attorney acknowledged that the district attorney's expert witnesses were going to discuss his "refusal to participate in Coalinga's treatment program" and said that Helm, like "80 percent of the people housed there," had his reasons for not participating. However, both of the defense's potential expert witnesses, he said, told him treatment, or at least an attempt to participate in treatment, was necessary. He said Helm now realized he should give treatment "a second look" and requested a continuance "for a long period of time" to stay "exactly where he is now" and have "a chance to participate in treatment."

The district attorney objected, opining that the defense had made no showing of "good cause." The court denied the request, finding exhaustion of "most of the good candidates already" and no reason either "to continue the matter just in hopes of finding an expert" or to "believe that anybody else on the list would be more likely to be able to render a useful opinion to you than the two that have been tried already" since Helm had "opted not to participate in treatment."

On the second day of trial, June 16, 2009, the district attorney's first expert witness testified. On the third day of trial, June 17, 2009, the district attorney's second expert witness testified; Helm testified in his own defense; the court instructed the jury; both counsel argued to the jury; and the jury commenced deliberations. On the fourth day of trial, June 18, 2009, the jury found Helm to be an SVP.

After over a year of refusing to participate in treatment while requesting and receiving multiple grants of additional time, Helm requested a continuance on the first day of trial "for a long period of time" to give treatment "a second look" and to have "a chance to participate in treatment." Denying his request essentially as entirely speculative, the court engaged in a sound exercise of discretion that cannot, in the absence of a showing of prejudice, result in reversal of the judgment of conviction. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1548, citing *People v. Fudge* (1994) 7 Cal.4th 1075, 1105-1106; *People v. Brady* (1969) 275 Cal.App.2d 984, 993-994.) The premise implicit in his constitutional argument is that the court's ruling was an abuse of discretion, so his due process claim is equally meritless. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)

2. Indeterminate Commitment

Helm argues that his indeterminate commitment violated the federal double jeopardy, due process, equal protection, and ex post facto clauses and the federal and state cruel and/or unusual punishment prohibitions. The Attorney General argues the contrary.

After *McKee,* the law is settled that an indeterminate SVPA commitment, even after the 2006 amendments, is a civil matter imposing no punishment. (See *McKee, supra,* 47 Cal.4th at pp. 1193-1195 [the 2006 amendments do not render the statutory scheme punitive]; see also *Collins v. Youngblood* (1990) 497 U.S. 37, 43 [the ex post facto clause prohibits only those laws that "retroactively alter the definition of crimes or

increase the punishment for criminal acts"]; *People v. Vasquez* (2001) 25 Cal.4th 1225, 1231 [the SVPA is "protective rather than punitive in its intent"]; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1179 [the SVPA neither imposes punishment nor otherwise implicates ex post facto concerns].) So Helm's double jeopardy, ex post facto, and cruel and/or unusual punishment arguments are meritless.

Likewise, the law is settled that an indeterminate SVPA commitment, even after the 2006 amendments, does not violate due process. (See *McKee, supra,* 47 Cal.4th at pp. 1188-1193 [imposing the burden of proof by a preponderance of the evidence that a committee with an indeterminate commitment is no longer an SVP does not violate due process]; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 357 [involuntary civil confinement of a limited subclass of dangerous persons with proper procedures and evidentiary standards is not "contrary to our understanding of ordered liberty"]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 77 [due process allows holding a civil committee "as long as he is both mentally ill and dangerous, but no longer"]; *Jones v. United States* (1983) 463 U.S. 354, 366-368 [imposing the burden of proof by a preponderance of the evidence that a committee with an indeterminate commitment is not guilty by reason of insanity "comports with due process"].)

Helm's equal protection challenge, on the other hand, is meritorious. "As for the equal protection challenge, we conclude that the state has not yet carried its burden of demonstrating why SVP's, but not any other ex-felons subject to civil commitment, such as mentally disordered offenders, are subject to indefinite commitment." (*McKee, supra,* 47 Cal.4th at p. 1184.) *McKee* ordered a remand for a determination of "whether the legislative distinctions in classes of persons subject to civil commitment are reasonable and factually based – not whether they are incontrovertible or uncontroversial" and "not whether the statute is wise, but whether it is constitutional." (*Id.* at pp. 1210-1211.) So do we.

3. Noncompliant Evaluation Protocol

Helm argues that the use of noncompliant evaluation protocol renders his commitment invalid. The Attorney General argues that Helm shows no prejudice.

The Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) requires agency compliance with specific procedures in the adoption of administrative regulations. (Gov. Code, § 11340.5, subd. (a).) A regulation that the Office of Administrative Law (OAL) finds noncompliant is an "underground regulation." (*People v. Medina* (2009) 171 Cal.App.4th 805, 813 (*Medina*); Gov. Code, § 11340.5, subd. (b).) Though not binding on the courts, OAL findings are entitled to deference. (*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 435, disapproved on another ground by *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577.) The OAL found the evaluation protocol at issue was an underground regulation adopted by the DMH in violation of the APA. (2008 OAL Determination No. 19, Aug. 15, 2008 (OAL file No. CTU 2008-0129-01).) Even if we assume, without deciding, that the OAL finding is correct, Helm nonetheless fails to show prejudice.

On the issue of whether the use of noncompliant evaluation protocol deprives the court of jurisdiction, Helm cites no case, and we are aware of none, so holding. Case law contradicts his position. (See, e.g., *Medina, supra,* 171 Cal.App.4th at pp. 815-819 [the use of noncompliant protocol does not deprive the court of SVPA jurisdiction]; *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1127-1130 [filing a petition before receipt by DMH of statutorily mandated evaluations does not deprive the court of SVPA jurisdiction].) "In general, the only act that may deprive a court of jurisdiction is the People's failure to file a petition for recommitment before the expiration of the prior commitment." (*People v. Whaley* (2008) 160 Cal.App.4th 779, 804; *People v. Evans* (2005) 132 Cal.App.4th 950, 956; *Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1171.)

The initial identification of an SVP begins with screening by the Department of Corrections and Rehabilitation (DCR) for possible conviction of a sexually violent predatory offense and of the inmate's social, criminal, and institutional history. (§ 6601, subds. (a)(2), (b).) If DCR screening identifies the inmate as a likely SVP, two psychiatrists or two psychologists or one of each use evaluation protocol to determine whether the inmate meets the statutory criteria of an SVP. (§§ 6000, 6601, subds. (b), (c).) "The purpose of this evaluation is not to identify SVP's but, rather, to screen out those who are not SVP's." (*Medina, supra,* 171 Cal.App.4th at p. 814.) Only if both evaluators concur that the inmate "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody" does DMH then request the filing of a petition for commitment. (§§ 6601, subd. (d), 6602.)

"'The Legislature has imposed procedural safeguards to prevent meritless petitions from reaching trial. "[T]he requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so."' (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.) The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process. (*Ibid.*)" (*Medina, supra,* 171 Cal.App.4th at p. 814.)

Judicial proceedings, all of which occur *after* the use of evaluation protocol, have several stages. The first stage is a "facial review of the petition," by which the court determines "whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (*People v. Hayes* (2006) 137 Cal.App.4th 34, 42 (*Hayes*); § 6601.5.)

If the court makes that determination, the second stage is a probable cause hearing, at which the inmate has the right to receive the assistance of counsel, to present "oral and

written evidence," and to "challenge the accuracy" of the evaluations by cross-examining the experts. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 245, fn. 8 (*Cooley*); § 6602, subd. (a).) At the probable cause hearing, the court determines "whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602, subd. (a).) If the court makes that determination, the third stage is a trial, where the court or the jury determines "whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release." (*Ibid*.)

The probable cause hearing in an SVPA case, like the preliminary hearing in a criminal case, tests the sufficiency of the evidence behind the allegations and protects the accused from having to face trial on groundless charges. (*Cooley, supra,* 29 Cal.4th at p. 247; *Hayes, supra,* 137 Cal.App.4th at p. 43.) So the probable cause hearing "is only a preliminary determination that cannot form the basis of a civil commitment; the ultimate determination of whether an individual can be committed as an SVP is made only at trial. (§ 6604.)" (*Cooley, supra,* at p. 247.) Since the standard of review of both a probable cause hearing in an SVPA case and a preliminary hearing in a criminal case is harmless error, irregularities "*which are not jurisdictional in the fundamental sense* shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if [the] defendant can show that he [or she] was deprived of a fair trial or otherwise suffered prejudice as a result of the error." (*Hayes, supra,* at p. 50, citing *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530 (*Pompa-Ortiz*), brackets in original and brackets added, italics in original; cf. *People v. Hurtado* (2002) 28 Cal.4th 1179, 1190.)

Here, there is no showing that, had the petition been dismissed due to the use of noncompliant evaluation protocol, abandonment of the commitment proceedings would have ensued, or that, had the experts used compliant evaluation protocol, a verdict finding Helm not to be an SVP would have ensued. Indeed, his argument fails to discuss at all

the evidence in the record on the basis of which the jury found him to be an SVP. He fails to make the requisite showing of prejudice.

4. Assistance of Counsel

Helm argues that his attorney rendered ineffective assistance of counsel not only by failing to raise constitutional objections to his commitment but also by failing to object to noncompliant evaluation protocol. The Attorney General argues the contrary.

In light of our rejection of all of Helm's constitutional arguments other than equal protection, on which we order a remand, and our rejection of his claim of prejudice due to the use of noncompliant evaluation protocol, his ineffective assistance of counsel argument is moot.

DISPOSITION

The matter is remanded with the direction to the trial court to determine whether Helm's indeterminate commitment under the SVPA after the 2006 amendments violated his federal constitutional right to equal protection. Otherwise the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Ardaiz, P.J.

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Levy, J.